Order

Michigan Supreme Court
Lansing, Michigan

June 9, 2023

Elizabeth T. Clement,
Chief Justice

162966

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 162966
COA: 349353
Cass CC: 16-010107-FH
16-010108-FH

RYAN RAY DEWEERD,
Defendant-Appellant.

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On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we REVERSE the March 11, 2021 judgment of the Court of Appeals, VACATE the sentence of the Cass Circuit Court, and REMAND this case to the trial court for resentencing.

The trial court assessed 10 points under Offense Variable (OV) 19, appropriate where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . . ." MCL 777.49(c).[1] The Court of Appeals has previously defined interfering with the administration of justice as "oppos[ing] so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals . . . ." *People v Hershey*, 303 Mich App 330, 343 (2013). See also *MacMillan Dictionary* (defining "interfere with" as "to prevent something from happening or developing in the correct way"); *Britannica Dictionary* (defining "interfere with" as "to stop or slow (something): to make (something) slower or more difficult").

In the present case, the trial court based its 10-point assessment on the defendant's statements to police officers after they executed a search warrant at his girlfriend's apartment and discovered methamphetamine and associated paraphernalia. According to

[1] MCL 777.49(a) and (b) concern circumstances where the defendant "threatened the security of a penal institution or court" and where the defendant "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services."

the Presentence Information Report, the defendant stated that he had not consumed methamphetamine, that he was not aware of methamphetamine being consumed or produced in the apartment, and that—had he been aware that methamphetamine was being consumed or produced in the apartment—he would have left the apartment.[2]

These statements are not sufficient to establish that the defendant interfered with or attempted to interfere with the administration of justice. Both the statutory language "interfered with or attempted to interfere with," MCL 777.49(c), and *Hershey*'s oft-cited interpretation of that language as "oppos[ing] so as to hamper, hinder, or obstruct," *Hershey*, 303 Mich App at 343, contemplate something more than a suspect's denial of culpability. That "something more" is identifiable in existing caselaw as actions that actively redirect the investigation, see, e.g., *People v Barbee*, 470 Mich 283, 288 (2004); that attempt to or successfully conceal evidence from law enforcement, see, e.g., *People v Ericksen*, 288 Mich App 192, 203-204 (2010); that attempt to or successfully prevent witnesses from testifying or providing evidence, see, e.g., *People v McDonald*, 293 Mich App 292, 299-300 (2011); and that attempt to or successfully prevent law enforcement from being able to arrest the defendant, see, e.g., *People v Smith*, 318 Mich App 281, 286 (2016). Unlike these examples, a defendant's denial of culpability—without more—does not slow or prevent a criminal investigation or constitute an effort to do so. In fact, the defendant's denial here did no more to affect the investigation than if the defendant had not spoken at all.[3] And while an admission of guilt may expedite a criminal investigation, OV 19 does not contemplate the failure to facilitate a criminal investigation, only the interference or attempted interference with one. There must be some daylight between attempting to interfere with the administration of justice and simply not assisting in or helping facilitate a criminal investigation. If a 10-point score is warranted under OV 19 for denying culpability because it hinders the administration of justice, "the OV becomes boundless." *People v Dixon*, 509 Mich 170, 181 (2022). Theoretically, a defendant could receive a 10-point score for remaining silent when questioned by police, testifying at trial (if the jury rejects the testimony), or even insisting on a trial in the face of overwhelming evidence of guilt. Anything short of immediately confessing and pleading guilty would seem to qualify as interfering or attempting to interfere with the administration of justice under this broad interpretation. We reject such an understanding of MCL 777.49(b).[4]

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[2] The exact language used by the defendant is not present elsewhere in the record.

[3] Given that our criminal justice system is an adversarial one that requires the prosecution to prove guilt beyond a reasonable doubt, it cannot be said that an offender's general denial of guilt constitutes an interference or an attempted interference with the administration of justice.

[4] Our dissenting colleague asserts that the defendant's statements were more than a general denial of culpability because the defendant "lied about specific evidentiary facts" and "tried

Finally, the increased punishment imposed because of the defendant's denial of culpability also raises constitutional concerns regarding the defendant's right to maintain his innocence, for which the defendant cannot be penalized. See *People v Dobek*, 274 Mich App 58, 104 (2007) ("A sentencing court cannot base a sentence even in part on a defendant's refusal to admit guilt.").[5]

For these reasons, the trial court erred in assessing 10 points under OV 19. The resulting change in the defendant's total OV score produces a lower applicable guidelines range, and the defendant is therefore entitled to resentencing. See *People v Francisco*, 474 Mich 82, 91 (2006).

We do not retain jurisdiction.

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to bolster his credibility by offering the police reasons to believe him[.]" While the defendant's statements are more than a bare-bones statement of "I am not guilty" or "I am innocent," they nonetheless do not arise to an interference or attempted interference with the administration of justice for the reasons discussed above. While denials of culpability may be accompanied by statements that do interfere or attempt to interfere with the administration of justice—such as the assertion of a false alibi that causes or may cause the police to prove its veracity—that is not true here.

The dissent also asserts that our approach creates difficult line-drawing problems for trial courts regarding what statements should be treated as general denials of guilt and therefore insufficient to support a 10-point score under OV 19. But our order and the existing caselaw provide guidance regarding what constitutes an interference or attempted interference with the administration of justice, and the trial courts will—as they already do with many other OVs—make case-by-case determinations on that basis.

[5] Our dissenting colleague, relying largely on *Brogan v United States*, 552 US 398, 404 (1998), asserts that the United States Supreme Court has resolved this issue by holding that the Fifth Amendment confers no privilege to lie. We are not prepared to agree that the defendant's constitutional arguments are foreclosed based on *Brogan* alone. *Brogan* has not been cited beyond its application to 18 USC 1001, which renders it a crime to "knowingly and willfully falsif[y]" a "material fact" or "make[] any materially false . . . statement or representation" within any matter in federal jurisdiction. There is no state counterpart to this federal statute, and, as stated, *Brogan*'s discussion of the Fifth Amendment has not been applied outside of that specific statute. The parties below did not cite or brief *Brogan*, and so we have not had the opportunity for adversarial discourse regarding *Brogan* or a discussion of how *Brogan* may interact with Michigan's established sentencing jurisprudence, such as *Dobek*. Because our textual analysis is dispositive of the defendant's appeal, we need not resolve this issue, but note it nonetheless for future litigants.

VIVIANO, J. (*dissenting*).

I agree with the majority to the extent it purports to hold that a general denial of culpability does not warrant scoring Offense Variable (OV) 19 at 10 points. I do not agree with much else in the majority's order, however. For starters, the majority's core analysis is largely based on an incorrect framing of the issue in the case. MCL 777.49(c) applies to both attempts to interfere and actual interference with the administration of justice: assessing 10 points is warranted if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . . ." The majority ends its inquiry after observing that the defendant's statements to the police did not "slow or prevent a criminal investigation," i.e., interfere with the administration of justice. But this is an *attempt* case. There is no real dispute that the defendant's statements did not actually interfere with the police investigation. The question is whether his statements were an *attempt* to do so. See *People v Bowns*, unpublished per curiam opinion of the Court of Appeals, issued February 10, 2022 (Docket No 356036), p 4 ("The key inquiry is . . . whether the offender made the false or misleading statement in an attempt to direct the police investigation away from him or her.").[6]

According to the presentence investigation report (PSIR), the defendant denied specific facts pertinent to the investigation: he told the police that he was unaware of any methamphetamine production occurring in the residence where he was staying and that he did not know there were any methamphetamine components or labs in the home. As the PSIR stated, he further informed the officers that given his two prior charges for manufacturing methamphetamine, "he would have left the residence if he knew meth was

[6] In a footnote at the end of the order, the majority acknowledges that this case involves an attempt but then confusingly asserts: "[G]iven that our criminal justice system is an adversarial one that requires the prosecution to prove guilt beyond a reasonable doubt, it cannot be said that an offender's general denial of guilt constitutes an attempted interference with the administration of justice, either." It is unclear what the standard of proof for the case in chief—beyond a reasonable doubt—has to do with anything. For one thing, the scoring of OVs is not based on the "beyond a reasonable doubt" standard but rather the preponderance of the evidence. See *People v Hardy*, 494 Mich 430, 438 (2013). And, in any event, the evidence here is not in dispute. The only question is whether the facts, as found, are adequate to show that the defendant attempted to interfere with the administration of justice, which is a question of statutory interpretation that we review de novo. See *id*. In short, I cannot discern the connection between any standard of proof and the fact that this is an attempt case.

being manufactured."[7] The majority fails to assess whether these statements represent an *attempt* to interfere with the administration of justice.

The majority similarly cuts corners by treating the statements as a general denial of culpability. They were, clearly, more than that. The defendant did not simply assert his innocence. In fact, he never actually stated something like "I'm innocent," or "I'm not guilty," or "I didn't do it."[8] Instead, he lied about specific evidentiary facts (i.e., his knowledge of the methamphetamine laboratory) and tried to bolster his credibility by offering the police reasons to believe him, i.e., that he did not know there was methamphetamine production at the house or methamphetamine components and that he would not be there if he had known of such facts. Cf. *Bowns*, unpub op at 6 (finding that OV 19 was properly scored at 10 points when the suspect denied sexually assaulting the victim and "made up a story about [the victim] being upset about a friend's dead cat . . . in order to avoid criminal liability"). The majority concludes—without any explanation of the apparent contradiction in terms—that these specific factual assertions somehow equate to a general assertion of innocence.[9] Nor does the majority acknowledge the difficult line-

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[7] Given the fact that the defendant pleaded guilty to maintaining a meth lab and drug house, his statements to the police were evidently false.

[8] Courts have recognized this distinction in other related areas of the law. See *State v Brooks*, 304 SW3d 130, 133-134 (Mo, 2010) ("[S]tatements to police must be substantive to waive the right to silence. . . . A general denial of culpability, such as 'I didn't do nothing at all,' does not waive the right to remain silent."), citing *State v Crow*, 728 SW2d 229, 232 (Mo App, 1987) ("To waive his right to not have the State comment on the exercise of his right to silence, a defendant must make a statement obviously related to something, and then the waiver is only as to the subject matter of that statement."); *State v Draganescu*, 276 Neb 448, 466 (2008) ("Many courts have held that, unlike general denials of guilt, a defendant's exculpatory statements of fact that are proved to be false at trial are probative of the defendant's consciousness of guilt."); *State v Fench*, 2010 – Ohio – 4701, ¶ 57 (Ohio App, 2010) (finding that a general denial of guilt to the police was not inconsistent with later trial testimony because such a denial "lacks factual substance and offered no information to police").

[9] The majority offers a strawman argument that a defendant's simple silence, testimony at trial, or even insistence on a trial could, theoretically, interfere with the administration of justice and justify a 10-point score on OV 19. No one has suggested such an argument, likely because these hypotheticals plainly seem to infringe on constitutional rights to the extent that they penalize a defendant's silence or invocation of the right to trial. See *People v Lockridge*, 498 Mich 358, 368 (2015) ("The right to a jury trial is a fundamental one, with a long history that dates back to the founding of this country and beyond."); *People v McReavy*, 436 Mich 197, 218 (1990) (noting a defendant's right to remain silent).

drawing problems posed by its approach. How are defendants, prosecutors, or courts supposed to determine what other misleading factual statements should be treated as general denials of guilt? Are the additional statements here a general denial because they are related to the defendant's knowledge? Because they had no appreciable effect on the investigation?[10]

The majority, in dicta, offers a host of examples (seemingly putting this Court's stamp of approval on factual situations well beyond that posed by this case) that offer "something more than a suspect's denial of culpability." One such example is where the defendant's actions "actively redirect the investigation." Of course, as noted, OV 19 can be scored for mere attempts. So the majority must mean that an attempt to "redirect the investigation" is sufficient to warrant a 10-point score. But why were the defendant's lies here not an attempt to "redirect the investigation" toward others? What else was he doing if not attempting to evade arrest and conviction by leading the police to look elsewhere?

Indeed, to obtain a conviction for the relevant charges to which the defendant pleaded guilty, the prosecutor would have had to prove that the defendant "knowingly ke[pt] or maintain[ed]" a place that is "frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances or that is used for keeping or selling controlled substances in violation of this article." MCL 333.7405(1)(d). The defendant was also charged with maintaining a methamphetamine laboratory, MCL 333.7401c, which similarly requires that the defendant knew or should have known of the illegal use of the underlying property (either a building, place, or area, or the chemicals or laboratory equipment). In asserting that he did not know that controlled substances were present, and that he would not have been at his residence if they were, the defendant directly denied the factual basis for the offenses. This goes far beyond a generic denial of guilt.

It is unclear where the majority proposes to draw the line between actual denials of guilt or assertions of innocence and additional false statements concerning the factual basis for the crime. Clearly the majority believes that some lies about the facts are not grounds for scoring OV 19 at 10 points. And by pretending the lies in this case were a general denial, the majority seems to suggest that they are encompassed by the constitutional right to maintain one's innocence. The majority states, "[D]efendant's denial of culpability is consistent with his constitutional right to maintain his innocence, for which defendant cannot be penalized," citing *People v Dobek*, 274 Mich App 58, 104 (2007). I am not certain what this means. Many statements are "consistent" with the right to maintain innocence. For example, the assertion that the sky is blue is perfectly consistent with such

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[10] The majority confusingly responds that there are no line-drawing problems because courts will have to "make case-by-case determinations" based on the existing caselaw. That is my point almost precisely—courts and defendants will not know where the line is based on any objective standard until an OV is scored in a given case.

a right. But the question is whether a lie concerning the facts of a crime implicates the defendant's constitutional rights.

The United States Supreme Court has provided an answer to this question, and in doing so it set forth an analysis that highlights the many flaws with the majority's reasoning and result. In *Brogan v United States*, 522 US 398 (1998), the Court examined a statute that made it a crime to " 'make[] any false, fictitious or fraudulent statements or representations' " to the government. *Id*. at 400, quoting 18 USC 1001 (1988). The federal courts struggled with whether this applied to simple denials of guilt. See *People v Ellis*, 199 Ill 2d 28, 33-35 (2002) (discussing the caselaw). Some courts devised an "exculpatory no" doctrine under which "a simple denial of guilt does not come within the statute." *Brogan*, 522 US at 401. But there was "considerable variation among the [federal] [c]ircuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial." *Id*. In rejecting this doctrine, the Court explained why even simple lies could amount to an interference with the administration of justice. The Court stated:

> We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued, perhaps, that a disbelieved falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of. [*Id*. at 402 (emphasis omitted).]

The same can be said in the present context. It is hard to understand how lies to the police "do[] not pervert a governmental function," especially where, as here, the lies relate to the facts necessary to prove the case against the defendant. And to the extent the majority relies on the fact that the defendant's lies might have been transparent and feeble, they are creating a tremendously difficult line-drawing problem.

The Court in *Brogan* also rejected the assertion that the exculpatory-no doctrine was necessitated by the Fifth Amendment privilege against self-incrimination:

> The second line of defense that petitioner invokes for the "exculpatory no" doctrine is inspired by the Fifth Amendment. He argues that a literal reading of § 1001 violates the "spirit" of the Fifth Amendment because it places a "cornered suspect" in the "cruel trilemma" of admitting guilt, remaining silent, or falsely denying guilt. . . . This "trilemma" is wholly of

> the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a "lemma," Allen, The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets, 67 U Colo L Rev 989, 1016 (1996)). And even the honest and contrite guilty person will not regard the third prong of the "trilemma" (the blatant lie) as an available option. The *bon mot* "cruel trilemma" first appeared in Justice Goldberg's opinion for the Court in *Murphy v Waterfront Comm'n of N Y Harbor*, 378 U.S. 52 (1964), where it was used to explain the importance of a suspect's Fifth Amendment right to remain silent when subpoenaed to testify in an official inquiry. Without that right, the opinion said, he would be exposed "to the cruel trilemma of self-accusation, perjury or contempt." *Id.*, at 55. In order to validate the "exculpatory no," the elements of this "cruel trilemma" have now been altered—ratcheted up, as it were, so that the right to remain silent, which was the liberation from the original trilemma, is now itself a cruelty. We are not disposed to write into our law this species of compassion inflation.
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> Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. "[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely." *United States v Apfelbaum*, 445 US 115, 117 (1980). See also *United States v Wong*, 431 US 174, 180 (1977); *Bryson v United States*, 396 US 64, 72 (1969). [*Brogan*, 522 US at 404-405 (emphasis omitted).]

In other words, there is no Fifth Amendment right to lie. See *Glickstein v United States*, 222 US 139, 142; 32 S Ct 71; 56 L Ed 128 (1911) ("[T]he immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with a license to commit perjury.").[11] Thus, contrary to the majority's position here, even construed as a general denial of guilt, the defendant's statements do not implicate the

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[11] Contrary to the majority's assertion, I do not believe that *Brogan* resolves the issue before us, given that it dealt with a federal statute. It does, however, offer a persuasive analysis that highlights many of the flaws in the majority's approach. Moreover, the majority incorrectly suggests that *Brogan*'s discussion of the Fifth Amendment might somehow be limited to the statute at issue there. The majority seems oblivious to the citations in *Brogan* (as seen above) and other cases not involving that federal statute but standing for the same proposition, i.e., that there is no Fifth Amendment right to lie. See *Glickstein*, 222 US at 142 (involving perjury in a bankruptcy proceeding); *People v Harris*, 499 Mich 332, 361-364, 379-381 (2016) (MARKMAN, J., concurring in part and dissenting in part) (discussing this same caselaw).

constitutional right against self-incrimination. And, as noted, the defendant's statements went well beyond a general denial by lying about the specific evidentiary facts necessary to prove the crime.

In light of this analysis, I would hold that while general denials of culpability are insufficient to warrant a 10-point score for OV 19, the defendant here went further and lied about the underlying facts and these lies are sufficient to support his score. A reasonable person would not conclude that simply saying "I didn't do it" or "I'm innocent" would be enough to hinder an investigation. Consequently, I do not believe that a suspect who makes such assertions is attempting to hinder the investigation. But self-serving lies about the underlying facts are different.[12] The administration of justice requires a determination of facts, such as those the defendant lied about here, to produce the arrest and conviction of the guilty. Suspects who lie about the facts underlying the elements of the offense have gone beyond simply remaining silent or even generically asserting their innocence. They

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[12] One way they are different, under current Court of Appeals caselaw, is that they can lead to a perjury conviction if they occur at trial, whereas a general assertion of innocence cannot. In *People v Longuemire*, 87 Mich App 395, 398 (1978), the Court of Appeals noted, in line with the law above, that "a criminal defendant taking the stand on his own behalf does not have a license to lie . . . ." The Court went on to distinguish between basic adjudicative facts (which "pertain to who did what, where, when, how and with what motive or intent") and with "issues of ultimate fact or law mixed with fact." *Id.* The latter "concern the legal definitions and effects ascribed to the basic facts or combinations of basic facts as found." *Id.* The Court explained that the latter were not subject to perjury charges because they were better construed as "mere opinion" and because of the constitutional protections on the right to testify. *Id.* at 398-399. Lies about adjudicative facts, by contrast, could be the basis for a perjury charge. See also *People v Buie*, 126 Mich App 39, 43-44 (1983) (explaining the difference between a statement of ultimate fact (e.g., " I didn't bribe Mr. X' ") and a statement of adjudicative facts (e.g., " 'I didn't give Mr. X $50,000' "), where the latter "denies no legal conclusion but rather asserts the nonoccurrence of an event").

In the present case, the defendant's statements arguably relate to adjudicative facts, i.e., the knowledge of the defendant necessary for commission of the crime. As such, the statements might have subjected the defendant to perjury charges if he had made them at trial. Because the lies here did not occur at trial, I need not decide whether this caselaw is correctly decided. Nevertheless, it illustrates the majority's flawed invocation of the presumption of innocence.

have done more, even, than questioning the sufficiency of the evidence against them. They have directly sought to deceive the investigators and thereby hinder the investigation into their guilt. And while it might seem that transparent or ineffective lies could not hinder an investigation, the broad scope of OV 19 explicitly includes mere attempts. There is no textual basis for distinguishing between compelling and feeble lies nor, as *Brogan* recognized, is there any practical way to do so.

Because the defendant lied about the specific evidentiary facts necessary to prove the charges against him, I would hold that he was properly assessed 10 points for OV 19. For this reason, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.